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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

ERNEST P. DANIELS, III
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND PRESERVATION OF THE ISSUE.

The Commonwealth charged Mr. Daniels with Possession of a Controlled Substance, (Cocaine)[1], and Possession with Intent to Deliver a Controlled Substance.[2] Mr. Daniels filed a pretrial motion to suppress the drugs based on the Fourth Amendment. The Trial Court conducted an evidentiary hearing on that motion and considered briefs filed by the parties.[3] The Court subsequently denied the motion to suppress without issuing written findings of fact and conclusions of law as required by the Pennsylvania Rules of Criminal Procedure, Pa.R.Crim.P. 323. The Trial Court then convicted Mr. Daniels of both charges.

Mr. Daniels appealed to the Superior Court of Pennsylvania, hereinafter, Superior Court. Superior Court reversed the conviction and ordered a new trial based on the Fourth Amendment violation. Commonwealth v. Daniels, 410 Pa. Super. 275, 599 A.2d 988 (1991); Appendix A. The Commonwealth then petitioned the Pennsylvania Supreme Court for an Allowance of Appeal which that Court denied. Therefore, the opinion at issue herein is that of Superior Court, Pennsylvania's intermediate appellate court.

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[1] 35 Pa.C.S. §780-113(a)(16)

[2] 35 Pa.C.S. §780-113(a)(30)

[3] The Record of that hearing is contained in the transcript entitled "Suppression Hearing", dated February 2, 1990, hereinafter, "S.H.".

B. Factual Background

Allegheny County Police Officers Kaminski and Hasara were assigned to the Drug Interdiction Unit at the Allegheny County Airport. (S.H., 4). When the officers came on duty at approximately 2:15 p.m., on March 3, 1989, an airline employee gave them Mr. Daniels' name. The agent claimed to have "assisted" a passenger named "Ernest Daniels" arrange to fly to La Guardia earlier that day. (S.H., 5). Mr. Daniels had paid cash for a round trip ticket to La Guardia, leaving at 12:05 p.m. and returning at approximately 4:34 p.m. (S.H.,5-6). The agent described Mr. Daniels as a "black male, dark complected, approximately 5'7" or 5'8", 175 pounds, casually dressed ... wearing jeans and carrying one blue nylon flight bag with red trim." Id.

The officers "established surveillance" at the arrival gate of Mr. Daniels' flight. (S.T., 8). The officers noticed Daniels deplane "among the first group of passengers". Id. He and his bag matched the description given by the informant. Mr. Daniels walked down the ramp to the concourse hallway. The officers followed him as he walked "at a fairly brisk pace" toward the main terminal, looking from side to side. Id. The officers followed him down the escalator to the lower level. As he walked, Mr. Daniels talked with "a business-dressed individual" who had deplaned among the same group of passengers as Mr. Daniels. (S.H., 10). Mr. Daniels passed the baggage

area, walked through the main lobby area and was about to walk through the doors to the outside when the officers approached him.

The two officers approached Mr. Daniels. Each displayed an identification and badge. (S.H., 11, 32). They said they were "both police officers with Allegheny County." Id. They asked Mr. Daniels if he would "mind speaking to" them for a few moments. Id. He replied, "sure" and put down his bag. Officer Hasara then asked him "where he was travelling in from today." Id. He said, "La Guardia, New York City." The officers asked to see his ticket and he told them that he had left it on the plane. Id. (The officers later found his ticket, on the plane, in the pouch in front of his seat. S.H., 53)

Officer Hasara then asked Mr. Daniels "the nature of his trip...". (S.H., 13) Mr. Daniels answered that he had gone to New Your to lend $2500.00 to a friend. Id. Officer Kaminski asked Mr. Daniels if he lived in Pittsburgh. Mr. Kaminski said, "yes." The officer then asked for identification. Id. Mr. Daniels handed him a Pennsylvania driver's license which identified him as Ernest P. Daniels, with a Pittsburgh address. The license had Mr. Daniels' picture on it. (S.H., 55). The officer returned the license. (S.H., 13). He then asked Mr. Daniels why he had not mailed a check for $25000.00 to his friend. Id. Mr. Daniels said that he needed to talk to the man. Id. The officers also asked Mr. Daniels if he worked in

Pittsburgh. Mr. Daniels said yes, that he was a part-time jitney driver. (S.H., 14).

After this questioning, Mr. Daniels asked the officer "what this conversation was about." Id. At that point the officer told him that they were working the "drug interdiction detail" to "intercept the flow of narcotics" through the airport. Id. The officer testified that he then told Mr. Daniels, "considering his trip was such a short destination and the fact that he didn't have an airline ticket with him, that he had left it on the aircraft, and the fact that he had, of course, only one carry-on bag, lack of any other kind of baggage other than this, that he drew our curiosity and we were curious as to the nature of his travel." Id. The officer testified that "in light of all this", he asked Mr. Daniels to consent to a search of his bag. As Officer Hasara reached for a consent-to-search card, Mr. Daniels said no, he did not want them to search his bag. (S.H., 15).

At that point Officer Hasara told Mr. Daniels that the search could be done in private, in the office which was about 200 feet away. Id. The officers turned and as they walked toward the office, Mr. Daniels followed. Id. The three men walked approximately 200 feet to a small office "about as far out of the mainstream of the public as you can get." (S.H., 38). Officer Hasara unlocked the door and walked into the office. Mr. Daniels walked into the office between the two officers. (S.H., 36-37). Officer Kaminski testified that the office was completely private, as it was located in the most remote area of

the airport, and was "completely enclosed with four walls". (S.H., 37).

Officer Kaminski testified that once Mr. Daniels was seated, they asked him "if he would mind now that we had a private setting if we conducted a search of his bag." (S.H., 17). Officer Hasara offered the consent form to Mr. Daniels. Id. Mr. Daniels said that he wasn't going to sign anything but they could look in his bag. (S.H., 17, 42). Mr. Daniels then opened the center compartment of the bag and began to remove clothing. Officer Hasara stopped him and again asked him to sign the consent form. After looking at the form for 15-20 seconds, Mr. Daniels signed it. (S.H., 42). Mr. Daniels unzipped two more compartments of his bag, removed the clothing, then stopped and "just sat." (S.H., 21). The Officers unzipped the compartment which Mr. Daniels had not opened and in it the officers found a ziplock bag of suspected cocaine. (S.H., 22).

The officers readily conceded that during this entire encounter, they never told Mr. Daniels that he was free to leave. They never told him that he did not have to answer their questions. They never told him that he could refuse to talk to them. They never told him that he could refuse to let them search his bag. (S.H., 33-35, 48).

Superior Court found, as the officer had testified, that they stopped Mr. Daniels based on the drug "courier profile": "he paid in cash and was travelling for a short duration to a source city" while garbed in "casual dress." 599 A.2d at 990,

992. The Court found, also based on the officer's testimony, that the only particularized suspicious behavior was that Mr. Daniels "walked at a brisk pace looking from side to side." Id. Insofar as the officers knew Mr. Daniels' name before they stopped him, they quickly ascertained that he was not travelling under an alias when he showed them his picture identification. The Court found that "their suspicions should have been allayed" at that point. 599 A.2d at 992. The Court held that to detain him beyond that point constituted an unjustified detention, vitiating any subsequent alleged consent, citing Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 1326 (1983).

The Court further held that the continued detention escalated the encounter at least into a Terry[4] stop which was not supported by reasonable and articulable facts of criminal activity. Not only did this illegal detention vitiate any claim of valid consent, but the Court found that Mr. Daniels' acquiescence to moving into the office was insufficient to prove consent. Again citing the officers' own testimony, the Court recognized that the officers had given Mr. Daniels only two choices: "either to be searched in public or searched in private to avoid public embarrassment." 599 A.2d at 990. As a result, the Court held, "we cannot justify a finding that [Mr. Daniels] voluntarily consented to a search in the drug interdiction office." Id. Consequently, "even assuming there was reasonable suspicion to stop Mr. Daniels," the police lacked probable cause

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[4]Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

to search him; and because the Commonwealth failed to prove a valid consent, the search and seizure violated the Fourth Amendment and should have been suppressed. 599 A.2d at 992.

Superior Court did not hold, as the Commonwealth claims, that the "officers' actions in the corridor of the airport which resulted in Respondent's accompanying them to their office constituted an illegal arrest ...". (Petition for Writ of Certiorari, at 12.) Nor did Superior Court's Opinion rest on the issues raised in the Commonwealth's "Questions Presented for Review." The Court did not hold that the police must "inform an individual ... that he possesses the right to refuse to consent to the search in order for that consent to be deemed voluntary ...". (Petition for Writ of Certiorari at i, "Questions Presented for Review"). Nor did Superior Court hold that "police persistence in seeking consent after consent has been initially refused constitutes a seizure under the Fourth Amendment." Id.

REASONS FOR DENYING THE WRIT

I. THE COMMONWEALTH'S RENDITION OF THE "QUESTIONS PRESENTED FOR REVIEW" DOES NOT ACCURATELY REFLECT THE HOLDING OR THE EFFECT OF SUPERIOR COURT'S OPINION.

Petitioner has misleadingly framed the issues before this Court[5]. Superior Court did not hold, as Petitioner would have this Court believe, that the police must inform a suspect of his right to refuse a search in order to obtain a voluntary consent to a search. See, Daniels, 599 A.2d at 990-992; Appendix A. Nor did Superior Court hold that a detention becomes a "seizure" when the police persist "in seeking consent after consent has been initially refused." Id. Consequently, even if this Court were to agree with Petitioner regarding the answers to Petitioner's "Questions presented for Review," this Court's agreement would not alter or effect Superior Court's holding.

The Commonwealth sought to justify the search herein entirely on an alleged consent. Contrary to Petitioner's claim, Superior Court held that the Commonwealth failed to sustain its burden to prove a knowing, voluntary and intelligent, or valid,

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[5]Petitioner Commonwealth framed the issue as follows:

Questions Presented for Review

I. Whether the Fourth Amendment requires the police to inform an individual, whose consent to search is being requested, that he possesses the right to refuse to consent to the search in order for that consent to be deemed voluntary, and whether police persistence in seeking consent after consent has been initially refused constitutes a seizure under the Fourth Amendment?

consent. Florida v. Royer, 460 U.S. 500, 103 S.Ct. 1319, 1324 (1983), citing Lo-JiSales, Inc. v. New v. New York, 442 U.S. 319, 99 S.Ct. 2319, 2326 (1979).

Superior Court found that the police stopped Mr. Daniels based on the drug courier profile. (A young black male dressed in jeans paid $294.00 for a round trip ticket of short duration to a source city). They then subjected him to extensive questioning. When that questioning failed to confirm their suspicions, and they ascertained that he was not travelling under an alias, they had to release him. 599 A.2d at 992; Appendix A. By continuing the interrogation, by moving him 200 feet completely enclosed office in the most secluded part of the airport, and by telling him that he had only two choices -a search in public or a search in private - the Court found that the officers seized him. Because this seizure was unjustified and unsupported under Terry, any consent obtained during this illegal detention was invalid. 599 A.2d at 990, citing Florida v. Royer, 103 S.Ct. at 1326.

Although Superior Court noted that the officers never told Mr. Daniels that he could refuse the search, the Court was more concerned about what they did tell him - that his only choice was for a public or for a private search. 599 A.2d at 990. The Court considered that fact as mitigating against the Commonwealth's claim that Mr. Daniels voluntarily accompanied the officers to the interrogation room. Even that fact was but one

of several which led the Court to conclude that the stop escalated or involved into a seizure. Id.

Nor did Superior Court in any way hold that Mr. Daniels' initial refusal to consent was the basis either for escalating the stop into a "seizure", or for invalidating his later consent. On the contrary, Superior Court merely noted Mr. Daniels' initial refusal and did not rely on that fact to invalidate the consent or to "constitute a seizure." Regardless of Superior Court's Opinion, the Commonwealth surely cannot dispute that a refusal to consent is a relevant fact which mitigates against the validity of a subsequent consent and therefore is a fact which the Commonwealth must overcome in order to sustain its burden. The Opinion considers the fact of Mr. Daniels' refusal as no more than a relevant fact, worthy of note, but not the basis or cause of the Court's holding. Id.

Therefore, this Court's resolution of the "Questions Presented" by the Commonwealth would result in no more than an advisory Opinion which would not effect either the holding or the outcome of this case. As this Court cannot and will not render advisory Opinions, review is not warranted. See California v. Freeman, 488 U.S. 1319, 109 S.Ct. 854, 856 (1989).

II. NO GROUNDS EXIST TO WARRANT THIS COURT'S REVIEW.

The Commonwealth has presented no grounds warranting this Court's review. U.S. Sup. Ct. Rule 10, 28 U.S.C. The Commonwealth failed to show "special and important reasons" necessitating this Court's review. Rule 10.1. Rather, the Commonwealth simply asserts "the importance of the issue to national drug interdiction." (Petition for Writ of Certiorari at 29.) The Commonwealth fails to explain how or why the issue in this case is of "importance to national drug interdiction." The Commonwealth cites no essential or commonly used drug interdiction practice or procedure which is at stake or in any way jeopardized by the opinion of Superior Court herein. In addition, the Commonwealth fails to illustrate any facet or fact of this case which is "special" or not previously addressed by this Court in Royer.

The Commonwealth has not shown that the issue herein is one on which the Circuit Courts have differed. Nor has the Commonwealth shown that Superior Court "decided a federal question in a way that conflicts with the decision of another state court of last resort." Rule 10.1(b). Although the Commonwealth claims that the opinion herein conflicts with two other state court opinions, that claims is disingenuous. (Petition for Writ of Certiorari at 29.) Both of those cases cited by the Commonwealth address an entirely different issue than has been raised, addressed, or decided herein.

Both of the cases relied on by the Commonwealth involve a suspect's invocation of his right to counsel during questioning. In State v. Childless, 4 Ohio St. 3d 217, 44 N.E.2d 155 (1983), the police stopped the suspect and advised him of his Miranda rights. "He indicated that he wished to have an attorney present before answering any questions." 448 N.E.2d at 155. Although the questioning ceased, Mr. Childless later consented to a search of his car at police request. Id. at 156. The sole issue before the Court was whether the invocation of his Fifth Amendment right to counsel, invalidated the subsequent waiver of his Fourth Amendment right. Id. at 157. The question in Childless was whether Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981) barred the police from requesting a Fourth Amendment waiver after the assertion of the Fifth Amendment right to counsel. 44 N.E.2d at 156. That issue has never been raised, discussed or addressed, either factually or legally, in this case.

The other case alleged by the Commonwealth to conflict with Daniels, State v. Cody, 293 N.W.2d 440 (S.D. 1980), discussed an issue similar to that in Childless, an issue which is entirely different from any issue existing herein. In Cody, the South Dakota Supreme Court reversed the conviction and ordered a new trial because the police continued to question the suspect and ultimately obtained a statement after he made numerous requests for counsel. 293 N.W.2d. at 443-449. Having ordered a new trial based on the Fifth Amendment violation, the South Dakota Court then discussed the impact of the Fifth Amendment violation on Mr.

Cody's subsequent consent to a search. Id. at 449. Anticipating the new trial, the Court, in dicta, advised that the Fifth Amendment violation did not "automatically invalidate" Mr. Cody's consent to search in the absence of counsel. Id. at 450.

Again, that issue has never been raised, addressed or decided herein. Mr. Daniels did not assert his right to counsel. Neither did he argue, nor did the Court decide, that his initial refusal to allow the search, invalidated his subsequent consent. Although the Commonwealth claims that this issue was "implicit" in Superior Court's decision, in fact it was not. Thus, even stretching the holdings in Cody and Childless to the most general possible issue, that issue is simply completely different from and unrelated in any way to the possible issues herein.

Finally, the Commonwealth failed to establish grounds for review under Rule 10.1(c). No characterization of the issue herein presents "an important question of federal law which has not been, but should be, settled by his Court." Id. The Commonwealth has not argued that any aspect of this case is novel or unsettled. Nor has the Commonwealth shown that the decision herein "conflicts with "applicable decisions of this Court." Id.

On the contrary, Superior Court's Opinion is entirely consistent with "applicable decisions" of this Court. Not only are the facts of Royer "remarkably similar" to the facts herein, but the Royer analysis informed and supported Superior Court's opinion. Royer held, "The scope of the detention must be carefully tailored to its underlying justification." 103 S.Ct.

at 1325. Therefore, even if the initial intrusion is deemed a "mere encounter, the permissible scope of that encounter, by definition, allows only a brief and limited detention. Instead, the officers subjected Mr. Daniels to prolonged and detailed questioning. His responses to that questioning failed to create reasonable and articulable suspicion warranting an investigative detention. In fact, the police quickly ascertained that he was not travelling under an alias, which should have allayed their suspicions and led them to release him. The continued and escalating detention which included removing him to a secluded office despite the absence of facts confirming the suspicion or justifying the detention, was therefore illegal. The illegal detention invalidated any consent given during that illegal detention. 103 S.Ct. at 1326, 1327.

The Commonwealth fails to demonstrate how Daniels "conflicts with" Royer. Although the Commonwealth asserts that Superior Court "misapprehended the rule in Royer", the Commonwealth utterly fails to explain how or in what respect Superior Court "misapprehended" Royer. (The Commonwealth does refer to one fact which existed in Royer and which is not present herein, but the Commonwealth fails to explain or demonstrate how a difference of one fact in any way creates a "conflict with Royer.") Consequently, the Commonwealth has failed to meet any of the grounds suggested in Rule 10 as warranting this Court's review.

CONCLUSION

Not only does Royer fully support Superior Court's opinion herein, but numerous other "applicable decisions of this Court" fully support Superior Court's Opinion. In Reid v. Georgia, 448 U.S. 440, 100 S.Ct. 2752 (1980), this Court found that facts similar to those herein were insufficient to justify stopping an airport passenger, even though Mr. Reid, unlike Mr. Daniels, appeared to be trying to conceal that he was travelling with another passenger and became "nervous" during the encounter with the police. Similarly, the facts supporting the stop in U.S. v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581 (1989), are so markedly different from the facts herein, that the Sokolow analysis further supports suppression herein. [See, also U.S. v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 1879, (1980), where a majority of this Court found that a stop occurred and three Justices found a valid consent because "it was especially significant that respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it."]

Moreover, Superior Court's conclusion is fully supported by this Court's decisions in Dunaway v. New York, 442 U.S. 211, 99 S.Ct. 2248 (1979) and U.S. v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574 (1975). Above all, Superior Court's conclusion was compelled by this Court's holding in Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 1290 (1990). In Smith this Court reiterated that legal justification to search a citizen's belongings must exist

before the search is conducted. A search can never be validated by its own fruits. Id. Insofar as no legal justification existed before the search herein, the search was invalid. Insofar as the Commonwealth has not established good and just cause for reconsideration of that conclusion, the Writ should be denied.

Respectfully submitted,

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Public Defender

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Attorneys for Respondent

> Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California.

Asahi Metal Industry Co., Ltd. v. Superior Court of California, supra, 480 U.S. at 112, 107 S.Ct. at 1032, 94 L.Ed.2d at 104–105 (emphasis added) (citations omitted).

So in the instant case, there is no evidence that Nippon designed its forklift in anticipation of sales in Pennsylvania. Similarly, there is no evidence that Nippon advertised its product in Pennsylvania, established channels for providing regular advice to customers in Pennsylvania or marketed the product through a Pennsylvania distributor who was acting as an agent for Nippon. The evidence does not show that Nippon has any agents or employees in Pennsylvania or that it solicits business in Pennsylvania. Under these circumstances, the courts of this Commonwealth cannot exercise in personam jurisdiction over Nippon merely because it was foreseeable that its forklift might find its way into Pennsylvania.

[3] Jurisdiction is proper only "where the contacts [with a state] proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528, 542 (1985) (emphasis in original). See: *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223, 226 (1957). Where third parties with a relationship to a non-resident defendant engage in unilateral activity in the forum state, the requirement that the defendant have minimum contacts with the forum is not satisfied. *Skinner v. Flymo*, 351 Pa.Super. 234, 242, 505 A.2d 616, 620 (1986), citing *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 542; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416–17, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404, 412 (1984).

[4] Insofar as can be determined from the record in the instant case, Nippon's only activity was to manufacture and sell a forklift to Mitsubishi. The manufacture of the equipment and its sale by Nippon took place in Japan. Nippon did not select a distributor in the United States or control Mitsubishi's selection of such distributor. We conclude, therefore, that Mitsubishi's unilateral act of shipping the forklift to MDI in the United States, where it was sold and ultimately found its way into Pennsylvania, is insufficient to support in personam jurisdiction over Nippon in Pennsylvania.

For these reasons, we hold that the trial court did not err when it dismissed appellants' complaint against Nippon for lack of in personam jurisdiction. Nippon did not purposefully direct any activity toward Pennsylvania that would subject it to jurisdiction in the courts of this Commonwealth.

Order affirmed.

COMMONWEALTH of Pennsylvania

v.

Ernest P. DANIELS, III, Appellant.

Superior Court of Pennsylvania.

Submitted April 18, 1991.
Filed Nov. 8, 1991.
Reargument Denied Jan. 6, 1992.

Defendant was convicted of possession of cocaine with intent to deliver following nonjury trial in the Court of Common Pleas, Allegheny County, Criminal Division, No. CC 8906665, Lutty, J., and defendant appealed. The Superior Court, No. 950 Pittsburgh 1990, Del Sole, J., held that

evidence of cocaine was obtained in violation of defendant's Fourth Amendment rights, and should have been suppressed.

Reversed and remanded.

McEwen, J., dissented.

1. Searches and Seizures ⇐181

Airline passenger escorted to interdiction office and searched did not voluntarily consent to search of hand luggage, where conduct of police officers indicated that only choice passenger had was either to be searched in public or searched in private to avoid public embarrassment. U.S.C.A. Const.Amend. 4.

2. Criminal Law ⇐394.4(13), 394.5(3)

Cocaine found in airline passenger's shoulder bag was inadmissible even though passenger consented to search by police officers once in interdiction room, since consent to be searched in interdiction room was product of illegal detention, and not result of independent act of free will. U.S.C.A. Const.Amend. 4.

3. Arrest ⇐68(4)

Airline passenger reasonably believed he was not free to leave, and therefore was "seized" within meaning of Fourth Amendment, where passenger who would not consent to be searched in airport concourse was escorted to interdiction office. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐184

Consent to search given by airline passenger after being escorted to interdiction office in airport was product of illegal detention, and therefore invalid, where defendant never consented to accompany officers to the office. U.S.C.A. Const.Amend. 4.

5. Arrest ⇐63.5(3)

In evaluating reasonableness of stop by police, courts must look to totality of circumstances—the whole picture. U.S.C.A. Const.Amend. 4.

6. Arrest ⇐63.5(5)

Police officers did not have reasonable suspicion to make "Terry stop" of airline passenger based on totality of circumstances, where passenger was not travelling under assumed name, despite fact that passenger fit drug courier profile to the extent that he paid for ticket in cash, was casually dressed, and was travelling for short duration to source city. U.S.C.A. Const.Amend. 4.

7. Arrest ⇐63.5(9)

Reasonable suspicion to justify "Terry stop" would not justify nonconsensual search of airline passenger's hand luggage where there was no canine sniff prior to search, no probable cause to obtain warrant in order to open and examine contents of bag, and no valid consent given for search. U.S.C.A. Const.Amend. 4.

James R. Wilson, Asst. Public Defender, Pittsburgh, for appellant.

Kevin F. McCarthy, Asst. Dist. Atty., Pittsburgh, for Com.

Before McEWEN, DEL SOLE and FORD ELLIOTT, JJ.

DEL SOLE, Judge:

Appellant, Ernest P. Daniels, III, has taken this appeal from the judgment of sentence to a term of imprisonment of from five years to ten years imposed after he was found guilty, following a non-jury trial, of violation of the Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §§ 780–102 *et seq.*, specifically, possession of cocaine with the intent to deliver. The trial court denied the post-verdict motions of Appellant and this appeal followed.

On appeal, Mr. Daniels raises one issue for review, whether the trial court erred in failing to suppress the cocaine found in his possession after his hand luggage was searched by Allegheny County Police Officers in Greater Pittsburgh International Airport Terminal.

A suppression hearing was held prior to trial, and the trial court denied the motion to suppress, on the grounds that: (1) that the officers did not conduct a "Terry stop", but their questioning of Appellant was merely a citizen encounter, and (2) Appel-

Digest

lant's consent to the search of his carry-on bag was freely and voluntarily given.

The record reveals that Appellant was approached by two police officers in the main concourse of the airline terminal. The officers had received information from an airline employee that Mr. Daniels had purchased a round-trip ticket to New York's LaGuardia Airport with cash, and that he had made reservations on flights which indicated that Appellant would be in New York for approximately four hours. The officers were using a drug courier profile based on such factors as cash paid tickets of short duration to a known narcotics distribution center such as New York, and casual dress rather than business attire, as grounds for monitoring the movements of Appellant in the terminal.

After Appellant deplaned, he walked at a brisk pace looking from side to side. As he approached the exit he was stopped by the officers who identified themselves and asked to see some identification. At this point the officers ascertained that Appellant was not travelling under an alias, and that his identification was all in order. Following this encounter, the trial court found that Appellant gave consent to a search of his hand luggage. We, however, hold that this finding of voluntary consent to search is not supported by the evidence.

[1] It is clear from the record that when first asked, Appellant refused to consent to a search. Then after this refusal, the officers asked if he was embarrassed to be searched in public, and he agreed he was. He was then escorted to the interdiction office. (N.T. February 2, 1990, at 15, 35). The officers' conduct indicated that the only choice Appellant had was either to be searched in public or searched in private to avoid public embarrassment. Therefore, we cannot justify a finding that Appellant voluntarily consented to a search in the drug interdiction office.

[2] Because we conclude that Appellant did not voluntarily consent to accompany the police officers into the drug interdiction office, we hold that Appellant was illegally detained in the interdiction office at the time he signed a consent-to-search form allowing the officers to open and search his shoulder bag. Consequently, the cocaine found in the Appellant's shoulder bag was inadmissible even though he consented to the search once he was in the interdiction room, because it was the product of an illegal detention, and not the result of an independent act of free will. *See, Florida v. Royer*, 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983), *citing, Dunaway v. New York*, 442 U.S. 200, 218–219, 99 S.Ct. 2248, 2260–2261, 60 L.Ed.2d 824 (1979).

The facts in *Royer, supra*, are in several ways remarkably similar to those of our case. In *Royer* the Appellant was questioned by detectives in an airline concourse because he fit the drug courier profile.[1] Upon request, but without oral consent, Appellant produced his airline ticket and driver's license, which carried his correct name. He was asked to accompany the detectives to a small room for questioning, but his license and ticket were retained by the police, and his baggage was retrieved from checked luggage. While in this small

1. The drug courier profile is not a "national profile." Profiles vary from city to city, airport to airport, and also depending on which law enforcement agency is using them. The profile is subject to racial abuse and gender stereotyping, where the fact that a person is an African-American, Columbian, or Hispanic has appeared as a profile characteristic, as has the fact that the person was the only woman on an airplane carrying business travelers. *Commonwealth v. Lidge*, 399 Pa.Super. 360, 582 A.2d 383 (1990). A breakdown of profile traits listed in the reported decisions reveals that it encompasses such contradictory characteristics as deplaning first and deplaning last, paying with small bills and paying with large bills. It also encompasses an extraordinary amount of innocent behavior such that the average airline traveler would be hard-pressed to not display at some time during a trip. Furthermore, it is not clear whether the display of one or two characteristics is sufficient to fit the profile, or whether if some characteristics carry greater weight than other characteristics such that the display of one of these weightier characteristics may trigger an airport stop. Note, The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures? 12 *Nova L.Rev.* 273, 288–296.

room he consented to the search of his luggage. The Supreme Court held:

> What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions ... [H]e reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated, and we cannot fault the Florida District Court of Appeal; for concluding that *Terry v. Ohio* and the cases following it did not justify the restraint to which Royer was then subjected. *Royer, supra.*, 460 U.S. at 503, 103 S.Ct. at 1327.

[3, 4] In the instant case, like *Royer*, Appellant allegedly fit the drug courier profile. However, he was not travelling under an assumed name. In fact when this was ascertained by the officers their suspicions became less reasonable, because they were less particularized. Also, as in *Royer*, Appellant "reasonably believed" that he was not free to go. In *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980), the Supreme Court held, "We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

In the present factual situation, in view of the all the surrounding circumstances, we hold that it was reasonable for Mr. Daniels' to believe he was not free to leave, and therefore the search constituted a violation of his Fourth Amendment rights. Appellant never consented to accompany the officers to the interdiction office, and therefore the consent to search given by Appellant, while he was in the office, was the product of an illegal detention, and was therefore invalid. Consequently, the fruits of this primary illegality, the illegal detention, should have been suppressed. *Dunaway, supra.*

Furthermore, we hold that the illegal search and seizure was not justified on traditional "Terry stop" reasoning, because, (1) the police did not have "reasonable suspicion" that Appellant was engaged in criminal activity, and (2) even if there were reasonable suspicion, this did not justify a non-consensual search of Appellant's luggage.

[5] The Supreme Court, in *United States v. Sokolow*, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989), has recently held that in evaluating the reasonableness of a stop, the courts must look to, "the totality of the circumstances—the whole picture." In *Sokolow*, respondent purchased two round-trip tickets from Honolulu to Miami, and paid $2,100 from a large roll of $20 bills. The ticket agent noted that Mr. Sokolow appeared nervous, and that he was wearing a black jumpsuit with gold jewelry. Respondent gave his name as Andrew Kray and neither he nor his travelling companion checked any baggage.

After Mr. Sokolow returned to Honolulu, he was seized by DEA agents and escorted to the DEA office in the airport. A narcotics detector dog sniffed Mr. Sokolow's luggage and alerted to the respondent's shoulder bag in the office. Appellant was advised of his rights, and the agents obtained a warrant to search the shoulder bag. They found no illicit drugs, but the bag did contain several suspicious documents indicating respondent's involvement in drug trafficking. The agents had the dog reexamine the remaining luggage, and this time the dog alerted to a medium-sized bag. It was too late to get a warrant to search this bag, but respondent returned home and the agents retained the bag. The next morning a warrant was issued and the bag was opened revealing over 1,000 grams of cocaine.

The *Sokolow* court determined that the information from the respondent's activities which conformed to the drug courier profile and such other activities, such as appearing nervous and looking around the waiting room during a stopover in Los Angeles, constituted, "in the totality of the

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circumstances" reasonable suspicion. Although, it reversed the court of Appeals, stating that both "probabilistic evidence", such as evidence available from a drug courier profile, and evidence of "ongoing criminal behavior", have equal evidentiary significance, nonetheless, each case must be evaluated on a case by case basis as, "the concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules." *Id.*, 109 S.Ct. at 1585.

[6] In the case before us, the officers had evidence which showed that Appellant fit the drug courier profile to the extent that he paid in cash and was travelling for a short duration to a source city. However, it was ascertained that he was not travelling under an assumed name as soon as the officers approached Appellant. Evidence that Appellant looked from side to side, is certainly not indicative of anything, nor is it even suggested that this behavior conforms to the drug courier profile. In fact, we do not know what the profile consists of, or to what degree the profile accurately identifies persons carrying drugs. Rather, all we do know is that when the officers determined that Appellant was not travelling under an assumed name, their suspicions should have been allayed. Therefore, in the totality of the circumstances, we hold that the officers did not have reasonable suspicion to detain Appellant.

[7] However, assuming *arguendo*, that there was reasonable suspicion to justify a *Terry* stop, the non-consensual search of Appellant's hand luggage was certainly not justified under *Sokolow*. In *Sokolow*, the Court held that since the seizure or *Terry* stop in question was justified by reasonable suspicion, the DEA agents could employ a narcotics detection dog to immediately conduct a canine sniff test. *See, United States v. Place*, 462 U.S. 696, 705, 103 S.Ct. 2637, 2644-2645, 77 L.Ed.2d 110 (1983), (exposure of luggage to a trained canine did not constitute a search within the meaning of the Fourth Amendment). It was only after the dog alerted to a particular piece of luggage that there was probable cause to obtain a warrant.

Here, there was no canine sniff prior to the search of Appellant's luggage, and no probable cause to obtain a warrant in order to open and examine the contents of the bag. As we have stated above, since there was no valid consent given for the search of Appellant's hand luggage, such search can not be justified by the Court's holding in *Sokolow*, even assuming there was reasonable suspicion to stop Appellant.

Therefore, we hold that the seizure of Appellant and the search of his luggage was effected in derogation of his Fourth Amendment rights, and the cocaine seized should have been suppressed.

Judgment of sentence is vacated and this case is reversed and remanded. Jurisdiction is relinquished.

McEWEN, J., dissents.

James MANZI, Appellant,

v.

H.K. PORTER COMPANY, Celotex Corporation.

Superior Court of Pennsylvania.

Filed Oct. 30, 1991.

ORDER

PER CURIAM.

The court hereby denies the application filed September 20, 1991, requesting reargument/reconsideration of the decision dated March 13, 1991. 402 Pa.Super. 595, 587 A.2d 778.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

COMMONWEALTH OF PENNSYLVANIA Petitioner	:	
v.	:	No. 92 - 830
ERNEST P. DANIELS Respondent	:	

PROOF OF SERVICE

I, Shelley Stark, Chief-Appellate Division, of the Office of the Public Defender do hereby certify that a true and correct copy of the within Brief In Opposition to Writ of Certiorari has been served upon opposing counsel, Kemal Mericli (412-392-4377).

Respectfully submitted,

Lester G. Nauhaus
Public Defender

By Shelley Stark
Shelley Stark
Chief-Appellate Division

Date: December 23, 1992